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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 763

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,

Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors Below.

Brief in Opposition to Petition for Writ of Certiorari

PRELIMINARY STATEMENT

Reasons Relied on for Denial of the Writ.

In all candor, the respondent fails to detect, among the reasons marshalled by the petitioner to invoke the writ, any "special or important reasons" (Rule 38, par. 5) which would command a review by this court of the above cause.

In fact, counsel are compelled to assert that the petition on file herein is frivolous and without any substantial basis whatever.

The petition, it is submitted, clearly falls outside the purview of Rule 38, par. 5(b), for these reasons:

A. The Question of Identical Employ.

This issue involved an interpretation, in light of the particular facts adduced in this case, of that statute (Section 56-928, ACA 1939) in Arizona's workmen's compensation act which defines an "independent contractor." (*Note:* All statutes discussed in this brief are fully set forth in the appendix to petitioner's brief.) Trial and appellate judges of the highest caliber have carefully analyzed the mass of evidence on this question and unanimously concluded that the plaintiff and defendant were not "in the same employ." We seriously doubt that the decision of the Court of Appeals on this point concerns "an important question of local law" within the meaning of the rule. Indeed, counsel would suggest that there is perhaps no better example of a question, on a certiorari petition, which should *not* be accorded the dignity of "an important question of local law" than a dispute over the application of facts to a statute which defines, in broad language, an "independent contractor"—a field of the law where opinions differ widely and necessity requires ample room for play of the joints. It is presumptuous for counsel to assume that this tribunal exists for the purpose of auditing the findings of competent trial and circuit judges on such routine and time-consuming problems as presented by this case.

B. The Election Question.

The petition does not establish that the decision of the court of appeals is probably in conflict with applicable Arizona decisions. Even a cursory study of the Arizona cases cited by the petitioner discloses that the Arizona court has never undertaken to define the statutory election given to a workman by Section 56-949, A.C.A. 1939. The only case referred to in the petitioner's brief which even mentions this statute is *Moseley v. Lily Ice Cream Co.*, 38 Arizona 417, 300 Pac. 958. The questions presented here were neither raised by the pleadings nor decided by the court in the *Moseley* case. In truth, the entire rationale of that decision is predicated on the fact that Moseley, *with full knowledge of his rights,* made a valid election. If the dictum of the *Moseley* case has any value as a guidepost to the attitude of the Arizona court toward Section 56-949, it indicates a lack of sympathy for the rigid, technical rule now advocated by the petitioner.

Mr. H. S. McCluskey, who has been counsel for the Arizona Industrial Commission since our workman's compensation law was enacted, outlined the status of the Arizona law in a statement to the trial court as follows (R. 127):

> *"This is the first case of this character we have experienced in 24 years we have been in operation. So we have no case clearly in point on the right of rescission after election.* • • •"

We find it hard to believe that the petitioner seriously urges that the opinion of the court of appeals is in conflict with any rule enunciated by the Arizona Supreme Court.

C. The Court as Trier of the Jurisdictional Facts.

At the outset of this case, in the trial court, the petitioner, in furtherance of its motion to dismiss (R. 25), argued with considerable force that the court lacked jurisdiction over the subject matter of the litigation. At that time, the court considered this motion on the pleadings and on the depositions of the principal witnesses who later testified at the trial. Counsel for the petitioner asked the court to dismiss the cause by deciding that the plaintiff and defendant were co-employees, that plaintiff had elected workmen's compensation as his remedy, and that in either event, the Arizona Commission had exclusive jurisdiction over the subject matter. At that stage of the case, counsel for the petitioner subscribed wholeheartedly to the axiom cited by the Circuit Court in its opinion (R. 216) that "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist." Having met with an adverse decision on this point, the petitioner has now repudiated its previous position and, ironically, seeks the intervention of this court's supervisory powers on the ground that it is a departure from "the accepted and usual course of judicial proceedings" for a federal court, sitting as trier to the facts, to determine whether the "conditions essential to the exercise of its jurisdiction exist."

ARGUMENT

I. Identical Employ.

The finding by the Court of Appeals (R. 217) that "the preponderance of evidence clearly sustains the implied finding of the district court that Sanderson and Porter were 'independent contractors' * * *" should preclude further

discussion of this issue. However, should this Court have any misgivings on the merit of this ruling, we direct attention to the

"RESPONDENTS' CONSTITUTIONAL ARGUMENT."

The respondent has previously taken the position, and urges here, that Sanderson and Porter are liable even if it is assumed that they were, in fact, fellow servants of Hubbell, for the reason that under the constitution of Arizona (Article 18, Section 6) an employee may sue a fellow servant whose negligence causes him harm. Here, in brief form, is the argument:

Premise One:

Under the common law action of negligence, a servant could, without limitations, sue a fellow servant for his negligent conduct. 57 *C.J.S.* "Master & Servant" 348.

Premise Two:

By Article 18, Section 6, of the Arizona constitution, the common law action of negligence is imbedded in the constitution and cannot be abrogated by statute or otherwise.

Premise Three:

Therefore, if the Arizona Legislature, by Section 56-949, A.C.A. 1939, intended to abrogate a workman's right to sue a negligent fellow servant (which intent respondent denies), the statute is unconstitutional.

Conclusion:

Assuming that Sanderson and Porter *were* actually fellow servants of Hubbell, they are still liable to him for their negligence.

The respondent's argument on this point is based on the Arizona Supreme Court's analysis of this constitutional provision in *Alabama Freight Co. v. Hunt,* 29 Ariz. 419, 242 Pac. 658. This argument would not be affected in the least by the fact that the common employer of both servants had workmen's compensation insurance at the time of the negligent act.

II. Election of Remedy.

RESTATEMENT OF FACTS AS TO ELECTION.

The respondent feels required to restate the essential facts on the election question, in order to correct serious omissions in the petitioner's statement of facts set forth in its brief at page 20:

Respondent John E. Hubbell was injured on June 17, 1949 (R. 103). He was under the influence of drugs for several weeks after the injury, and, in time, his right foot and the second, third, fourth and fifth fingers of his left hand were amputated. His memory is dim regarding the events of the first two or three weeks of his convalescence (Reporter's Transcript, pages 23, 24). On June 22, his employer reported the accident to the Arizona Industrial Commission (R. 170). The employer made no mention in this report of negligence by a third party (see question 19, R. 107). Some time prior to July 6, the Commission mailed to Hubbell or his wife an application for workmen's compensation (Reporter's Transcript, p. 34). There is no evidence in the record that the plaintiff or his wife requested that the Commission send them applications of any kind. Throughout, the Commission handled the case as though it was a routine employer-employee type accident (R. 158), and the Commission did not send to Hubbell or his wife the

election of remedy form (R. 168) which the Commission customarily sends out to employees injured by third parties (R. 158). Thus plaintiff did not know what his rights were when he signed the applications for compensation (R. 105, 106), and did not realize the necessity of choosing between compensation and suing Sanderson and Porter until after he had consulted counsel some seventy-five days after the accident (R. 109). When his attorneys advised him that he could sue the defendant as a negligent third party, he notified the Commission to make no further compensation payments, filed an election of remedy form with the Commission, and instituted the instant suit (R. 106, 108).

ESTOPPEL.

Can the petitioner, a negligent third party who is a stranger to the compensation act, argue that respondent Hubbell made a valid, binding election, or is this a matter which properly concerns only the respondent and the Arizona Commission? Respondent strenuously insists that a negligent third party may only interpose those defenses available to any party defendant in a common law negligence action. An excellent statement of this principle of law is contained in *Parkhill Truck Co. v. Wilson,* 190 Okla. 473, 125 P.2d 203:

> "The Workmen's Compensation Act was not enacted by the Legislature for the benefit and protection of a negligent third party nor does it purport to increase or decrease such third party's liability under the common law for negligence. *It is no concern of a negligent third party what the arrangement is between the injured employee on the one hand and his employer and insurance carrier on the other.*"

Counsel commends to the court the sound, realistic thinking which informs the *Parkhill* opinion. We submit that this case enunciates the broadest rule yet formulated to preserve the cause of action of a workman who is injured by a negligent third party, and perhaps foreshadows future decisions which will deny haven to negligent third persons who seek refuge in the statutes defining the relationship between workmen and their employers.

THE ARIZONA LAW.

We assert again that the election question is a matter of first impression in Arizona; for all their contrary protestations, this fact is implicit in the very arguments set forth in petitioner's brief. The election statute itself (Section 56-949, A.C.A. 1939) commands that a workman injured by a negligent third party *"shall elect"* his remedy. In view of this statute and Article 18, Section 6, of the Arizona Constitution, we find it difficult to comprehend the argument of the petitioner that the election conferred by the statute and confirmed by the constitution may be an involuntary, unwitting, or even accidental one. It is obvious from a reading of the opinion of the Court of Appeals that its decision was controlled in large measure by the construction placed on this constitutional provision by the Arizona court in the *Alabama* case, supra (R. 217). Counsel cannot agree with the petitioner that the Court of Appeals based its decision on *Johnson v. American-Hawaiian S.S. Co.*, 98 Fed. 2nd 847, although we believe that this is the only decision by a Federal court which contains an exhaustive analysis of the election question.

The *Pressley* case (cited on page 23 of petitioner's brief) will speak for itself. True, it may illuminate some aspects

of some of the questions which concern us here. However, on the facts cited by the petitioner, it is apparent that that case has several features which distinguish it from the case at bar.

III. The Jurisdictional Question.

PETITIONER ESTOPPED BY INVITED ERROR.

The Court of Appeals correctly assumed that the petitioner maintained in the District Court that the issues of election and identical employ were jurisdictional and triable to the court. In this regard we would call the attention of the court to the following: Paragraph VIII and the prayer of the defendant's answer (R. 61, R. 63); defendant's motion for summary judgment (R. 48, R. 55); the defendant's motion to dismiss (R. 25); defendant's argument to the trial court on its motion for an instructed verdict (R. 143); and petitioner's motion for judgment in accordance with motion for directed verdict (R. 84). The central idea advanced by these pleadings and the concomitant oral arguments was that the District Court had no "power" to hear the case, exclusive jurisdiction being vested in the Commission.

Having invited the trial court to try the jurisdictional facts, the petitioner should now be estopped from alleging error insofar as the trial court's decision on these matters was concerned. The appellate rule of invited error is a salutary one and we feel that it should properly be applied in this case. See 5 *C.J.S.*, Appeal and Error, Section 1503.

ARGUMENT ON THE MERITS.

At the threshold of the case the trial court had to determine whether it or the Arizona Commission had jurisdiction over the subject matter involved. Obviously (aside

from respondent's constitutional argument) if the plaintiff and defendant were fellow servants, or if the plaintiff had bound himself to accept compensation, the District Court could not entertain the case. The judge proceeded to determine these facts and, finding against the petitioners, overruled their motions to dismiss and for summary judgment and proceeded with the trial of the cause. The facts of the Oklahoma case cited by the Court of Appeals (*Dolese Bros. v. Tollett,* 162 Okla. 158, 19 P.2d 570) are on all fours with the instant case on this point. The Oklahoma election statute is, for all purposes, identical with Arizona's Section 56-949, A.C.A. 1939. Under these circumstances, the reasoning of the Oklahoma court in this case should be highly persuasive:

> "A trial court is required to determine the legal question of whether or not it has jurisdiction of the subject matter of an action presented to it for determination. If it does not have jurisdiction of the subject matter of the action, it cannot legally impanel a jury to submit any question to a jury. It is neither authorized or required to submit to a jury the question of whether or not it has jurisdiction of the subject matter of an action."
>
> (See also *Freire v. Matson Nav. Co.,* 109 P.2d 1022.)

IV. Ownership of the Cause of Action.

As we understand it, the petitioner contends that the respondent should have asked the Commission to have his apparent election set aside before filing suit. In seeking to ascertain whether respondent Hubbell elected his remedy, the inquiry is really directed to the question "What happened to his cause of action?" If he made a valid binding election, his cause of action would pass to the Commission:

but, on the other hand, if he was not granted a reasonable election he still retained ownership of his cause of action against those whose negligence caused his injury, and was the only person who could properly file a claim against the negligent third party. Neither an apparent election nor any operation of statute could divest him of his cause of action; only a voluntary choice with full knowledge would satisfy the statutory command that "he shall elect * * *."

V. Petitioner's Right to a Jury.

Even if the petitioner was wrong in the trial court, and the issues of election and identical employ were not triable to the court, the judgment must still be sustained, as we have urged heretofore, on the ground that there was no conflict in the evidence on these issues. We particularly invite the court to compare the testimony of respondent's witnesses Lovell and Fields with that of petitioner's witnesses Dunn, Broockmann, Snider and Sanders on the issue of identical employ. We submit that there is no conflict or contradiction between these witnesses on the vital question as to who retained actual supervision and control of the details of the work. In such case, the question of employment status is always a question of law and not one of fact. 56 *C.J.S.*, "Master & Servant," pp. 48, 92; *DeBord v. Proctor & Gamble Distributing Co.*, 58 F. Supp. 157, affd. 146 F.2d 54.

CONCLUSION

On the face of the record, it is clear that this case was carefully and fully considered in both of the lower courts.

No "special or important reasons" appear in the petition which would warrant issuance of the writ.

There is no showing in the petition that the Court of Appeals decided any *important* question of local law in a way probably in conflict with applicable Arizona decisions.

The reasons relied on for the allowance of the writ are so unsubstantial as to justify the conclusion that the petition was sued out only for delay.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied, and that damages be awarded to the respondents in accordance with Rule 30, Section 2. (See *Southern R. Co. v. Gadd,* 233 U.S. 572, 58 L.Ed. 1099, 34 S.Ct. 696.)

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 76

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Petitioners' Reply Brief

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